

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
June 2007 Session

STATE OF TENNESSEE v. FRED EUGENE THOMPSON, JR.

**Direct Appeal from the Criminal Court for Davidson County
No. 2001-B-1192 Walter Kurtz, Judge**

No. M2006-00292-CCA-R3-CD - Filed August 24, 2007

A Davidson County jury convicted the Defendant of first degree felony murder and theft of property valued over \$1000. He was sentenced to life in prison for the first degree murder conviction and to five years for the theft conviction, and the trial court ordered the sentences to run concurrently. On appeal, the Defendant contends that: (1) the trial court erred when it denied his motion for a judgment of acquittal at the close of the State's proof; (2) the evidence is insufficient to sustain his convictions; and (3) the trial court failed to perform its role as a thirteenth juror. We affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and NORMA MCGEE OGLE, JJ., joined.

Thomas B. Luck (on appeal) and Leann Smith (at trial), Nashville, Tennessee, for the Appellant, Fred Eugene Thompson, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Deborah Housel and Lisa Naylor, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

I. Facts

This case arises from the murder of Williams Burton Craig, which occurred on November 29, 2000. The Defendant, along with a co-defendant, Augustine John Lopez, III,¹ was indicted for first degree felony murder, theft of property valued under ten thousand dollars, and first degree premeditated murder.

¹Lopez appealed his convictions to this Court, and we affirmed the judgments in that case. *See State v. Augustine John Lopez, III*, No. M2003-02307-CCA-R3-CD, 2005 WL 1521826 (Tenn. Crim. App., at Nashville, June 28, 2005), *perm. app. denied* (Tenn. Dec. 5, 2005).

At the Defendant's trial, the following evidence was presented: Carolyn Craig Dunn, the victim's sister, testified that her fifty-three-year-old brother lived with and helped care for their elderly mother at her mother's residence. Due to health concerns, their mother had moved from the home four weeks before this incident.

Dunn testified that, in the spring before her brother's murder, he was injured in a road rage situation. She said that her brother, who had likely been drinking, attempted to merge in front of a UPS truck. When the driver of the UPS truck did not allow him over, the victim followed the truck, "ranting and raving and blowing his horn." The UPS driver stopped, and the two engaged in an altercation. The victim suffered injury to his nose, lips, and eyes, and he bled all over the inside of their mother's white Mercury Marquis. This car was later stolen according to Dunn and was worth \$9500 when it was taken.

Dunn testified that her brother routinely kept \$1500 in his bedroom but never more than that because he was afraid of being robbed. He told her that he kept the money taped to the back of his headboard. After the victim's murder, Dunn went through his bedroom, and she noticed that a TV, VCR, video camera, and clothes were missing from his room. Dunn testified that the victim kept his room neat and organized, and there were items thrown around the room after his murder.

On cross-examination, Dunn agreed that her brother drank heavily. She said that she had not been to her brother's house for two weeks before his murder, and he usually kept his bedroom door closed and locked to prevent anyone from entering. Dunn agreed that her brother could get mad easily, suffered from brain damage, and drew a social security check. She said there were other items in the room that had not been taken, such as stereo equipment and a camera, and that much larger televisions and other stereo equipment located in other parts of the house were not taken.

Priscilla Floyd testified that she was previously engaged to co-defendant Lopez. She said that she had met the victim only once and that was on the night before Thanksgiving, November 22, 2000. On that night, the victim and Lopez drove in the victim's light colored car to Floyd's parents' home to pick her up and take her to the victim's house at around midnight. When she was at the victim's home, there was a woman, whom Lopez appeared to know, waiting for them in a crawl space under the house.

Sometime after Thanksgiving, Lopez called Floyd and he told her that he had done something and might have to go to jail. She assumed that it was something small, like shoplifting, which the two of them had done together previously. In that regard, she admitted that she had previously been convicted of misdemeanor theft. On cross-examination, Floyd described the victim as "[o]utrageously drunk" while she was at his house and said he was digging in the cushions for a gun. Additionally, Floyd testified that while she was at the house Lopez attempted to find something for her to eat. He rummaged through the kitchen looking through cans of food trying to decide what he and Floyd would like. Floyd testified that, at one point, the woman who had been under the house became upset and was screaming on the telephone. Floyd thought that this woman was on drugs, and she recalled that both this woman

and the victim threatened to kill the person on the phone.

Bobby Rately, an officer with the Metro Nashville Police Department, testified that he received a call that someone was dead at 635 Harding Place, and he arrived at the residence approximately two minutes after receiving the call. When he arrived, a man named Barry Todd Irvine was already there and showed him where the body was located, which was inside the house on the kitchen floor. Officer Rately placed Irvine in his patrol car and later brought him to the homicide office for questioning, which is standard procedure. On cross-examination, the officer testified that he was the first at the scene of this crime, and he did not recall whether the lights were turned on or off at the house.

Barry Todd Irvine testified that the victim was his old friend, and the two drank and “partied” together. He spoke with the victim early in the evening on November 29, 2000, and the two planned to get together later that evening. Irvine described their conversation as “brief” because the victim was speaking with someone else on his other line. Irvine attempted to call the victim back between seven and ten times, and, when he repeatedly received a busy signal, he knew that something was wrong. He arrived at the victim’s house between 9:30 and 9:45 p.m. and noticed that all of the cars were missing, and the gate, which was always latched closed, was open. He backed his van into the driveway and noticed that the sliding glass doors were pushed all the way open and that a dim light was coming from the house. He walked inside, calling for the victim but got no response. Irvine went back outside, drank a few sips of beer, and then reentered the house. He saw the victim, who had been severely beaten, lying on his side with his hands and feet bound. Irvine backed out of the house and called his wife, who contacted 911. Irvine testified that the last time that he saw the victim alive was two days before Thanksgiving.

On cross-examination, Irvine testified that during one of their phone conversations the victim told him that he had friends at the house. Irvine agreed that he had previously met a woman named Jan Crow Beech² at the victim’s house, and it was his understanding that she was living at the victim’s house. Irvine had heard Beech mention a man named Rabbit Veach, who was her ex-husband. Irvine also testified that, a week before the victim’s death, he saw a gun in plain view at the victim’s home, and Beech told him that she would use the gun to shoot her ex-husband if given the opportunity.

Vallean Hare testified that she previously owned the Four Aces bar, and she said that she knew the Defendant as Fredro. She said that he had been a patron of her business for fifteen years, and he frequented her bar in November of 2000. Hare recalled an incident where she had to terminate an employee named Stella “May” Mitchell when she found out that May was using crack cocaine and did not show up to work. Hare testified that this occurred in November of 2000, sometime after Thanksgiving, and that Sharon Vickers covered Mitchell’s shift.

Sharon Vickers testified that she was a bartender at the Four Aces Bar and that she was

²Jan Crow later testified and stated that her name is Jan Crow Beech. In the record, many of the witnesses refer to her as Jan Crow or Jan Crow Veach. For clarity, we will refer to this woman as Jan Crow Beech.

working on November 29, 2000. Vickers identified the Defendant as "Fredro" and said that she had known him since she began bartending sixteen or seventeen years before this incident. Vickers recalled that on November 29, 2000, she was required to work for another bartender, Mitchell, who had not arrived for work as scheduled. The Defendant came into the bar before her shift ended at 5:00 p.m., trying to sell some clothes, a TV, and a VCR. Someone told her that Mitchell was in the Defendant's car, and she went outside to see. Outside, she saw Mitchell lying down in the front seat of a white four-door car, presumably so that she could not be seen.

Kevin Allen, an officer with the Metro Police Department, testified that he was dispatched on November 30, 2000, to secure a white Mercury that was involved in a homicide. He arrived at the Four Aces bar, where the vehicle was located, approximately five minutes after receiving the call. When he arrived, the two neighbors who had called in about the car were present, and there was no one inside the car. On cross-examination, Officer Allen testified that he had seen the car in the same location the day before at around 10:00 or 10:30 p.m.

Charles Ray Blackwood, Jr., an officer with the Metro Police Department, testified that he was working on November 29, 2000, when he was called to the scene of this killing at around 11:15 p.m. When he entered the house through the back door, he saw the victim's body on the other side of the kitchen counter. The officer noticed that the victim's legs and hands were bound by the cords of a toaster and a can opener. Near the victim's head was a can of Vietti Chili that had been heavily damaged and coated with blood. Toward the victim's feet was a can of Sweet Sue chicken and dumplings that had blood on it and was dented. Toward the refrigerator was a white plastic-handled knife. Officer Blackwood also noted that one of the bedrooms in the far back of the house had been ransacked: there was a chair turned upside down on the bed; there were empty gun holsters on the bed; an old fire safe; papers thrown; and things had been turned over. The officer collected evidence and dusted the scene for fingerprints. The officer was able to develop prints on some of the items that he collected, including the two bloody food cans and the can opener. Officer Blackwood testified that he also examined the white Mercury involved in this case. He said that blood was found on the steering wheel. Another officer, Lieutenant Darrell Ryan, testified that he assisted in processing the crime scene, and he found identifiable prints that he gave to a latent fingerprint examiner. Of the prints that Lieutenant Ryan found, the Defendant's fingerprints were found on the outside of the bathroom door and on a telephone handset in the den.

Charles Mike Anglin, an officer with the Metro Nashville Police Department, testified that he responded to this crime scene and was assigned to take care of the documentation and collection of evidence. He also examined the white Mercury Grand Marquis involved in this case, and he found a few droplets of blood inside the vehicle. The officer also testified that the keys to the car were never found.

Cheryl Flatt testified that she had known the victim in this case for over twenty-one years, and she met him because she had been married to his stepbrother. The victim came to her home during the afternoon of November 29, 2000. Before he left, he showed her two "wads" of hundred dollar bills in his pockets. Flatt told him to put the money in a safety deposit box and not to carry it around. The victim called her later when he got home at around 8:30 p.m. While

the two were speaking, Flatt heard the dog barking and asked who was at the victim's door. The victim told her that some of Beech's friends had come to his door. She said, "There was a lot of concern in his voice at the time and he asked me to call him back in 10 minutes to be sure he was okay." Flatt testified that she called the victim back in ten minutes, and his phone line was busy and remained busy, which was unusual because he had call waiting. She became concerned and called a mutual friend, William Dunaway, and told him that she thought that something was wrong at the victim's house. Dunaway later called her back and said that the victim was dead.

Flatt testified that she knew Jan Crow Beech as the victim's acquaintance. Flatt said that Beech was living at the victim's house and that her living there had caused the victim problems. Three days before the victim's death, the victim made Beech take her clothes from the home. Flatt testified that she was aware that the victim sold marijuana, and there was no way that she knew all of his friends and acquaintances.

William Dunaway testified that he had been friends with the victim since they were teenagers and that he also knew Flatt. He said that he and the victim had gone to two banks during the day before the victim was murdered, and Dunaway thought that the victim was getting cashiers checks to pay off a credit card. He said that, sometime after 7:30 p.m. that evening, Flatt called him and said that while she was talking to the victim on the phone someone had come to the door, and she wanted Dunaway to go check on the victim. Dunaway then tried to call the victim himself, and the phone line was busy. Dunaway agreed that this was unusual because the victim had call waiting. He learned later that evening that the victim had been killed, which he relayed to Flatt. Dunaway said that because he had known the victim for thirty-five years he knew many of his friends, but he did not know the Defendant or the co-defendant. On cross-examination, Dunaway testified that, while he and the victim had been at two banks during the day, he never saw the victim with any money.

Jan Crow Beech testified that she knew co-defendant Lopez. She met him when she had driven the victim's Mazda Miata to buy some crack cocaine on November 22, 2000, and she saw Lopez and hoped that he would help her in that regard. Lopez got into her car, they drove around, and, at one point, they went behind a building and engaged in sexual intercourse. Lopez then asked Beech if he could ride home with her because she owed him some money. Beech was staying at the victim's house, and she allowed Lopez to go there with her.

Beech testified that, on their way to the victim's house, she got the tire of the victim's car stuck on some railroad tracks. She and Lopez went on foot to the house where her friends lived and asked to use the telephone. Beech called the victim, and, while the two were on the phone, the train came through and smashed his car. Her friend then gave her and Lopez a ride to the victim's house. The victim had already contacted the police, and the police took her back to the railroad tracks and had her fill out a report. When the police came to the house, Lopez hid in the victim's bedroom. Beech estimated that she was with the police for about two hours, and then the police took her back to the victim's house. When she got there, no one was there and it was windy. Beech said that she went under the house where the victim had had some plumbing work done to get out of the wind. She was there for about ten minutes until the victim, Lopez, and Lopez's girlfriend, Priscilla Floyd, arrived. They all went into the house, and Lopez fixed

himself something to eat. Lopez and his girlfriend spent the night in the victim's guestroom. The victim woke up the next morning and told Beech that he was going to take Lopez and Floyd home.

Beech testified that she never saw Lopez again. She said she was still living at the victim's home when the victim was murdered. Beech said that she and the victim had previously had problems with her ex-husband, Veach. She had told Veach to leave the victim alone because he was going through a hard time putting his mother in a nursing home, and he had done nothing but offer her a place to stay.

Beech testified that, after the murder, she spoke with police on numerous occasions. She assisted them by helping make a composite sketch of Lopez. She said that she also told the police that this crime may have been committed by Veach, and the police spoke over the telephone with Veach on multiple occasions.

On cross-examination, Beech testified that when Lopez was at the victim's house everyone was getting along well. She said that she never paid Lopez the money that she owed him. She agreed that it was possible that Lopez had gone to the victim's house between the night that they were there together and the night that the victim was killed. She agreed that she had heard that the victim had thrown her clothes out, but she did not see it happen because she was staying off and on with her ex-husband. She said that she was not at the victim's house on the night of the murder because she was staying with her ex-husband at his trailer in Columbia. She said they left only to go to Wal-Mart and to pick up a television.

Beech agreed that she may have said that she would "blast" her ex-husband when he came back to the house. She also agreed that there was a lot of conflict between the victim, Veach, and herself. Beech testified that Veach had slashed the victim's tires and had stalked her. The victim had called the police in response. Beech said that, in another incident, Veach had left nine threatening messages on her cell phone. He threatened both her and the victim and said that he would "beat [their] asses until [they] were dead." On November 21, 2000, she took out a warrant against Veach for aggravated assault and vandalism. He had threatened to kill her with an ice pick. On redirect examination, Beech testified that she was with Veach the entire evening of November 29, 2000.

Danny Satterfield, an officer with Metro Nashville Police Department, testified that he interviewed the Defendant on December 23, 2000, as part of this homicide investigation. The Defendant voluntarily spoke with police and denied that he had ever been to the victim's house. During the interview, the officer asked the Defendant how the Defendant had gotten a cut on his hand, and the Defendant said that it occurred while he was working on "Teresa's" car a month ago.

Bradley Everett, a special agent with the Tennessee Bureau of Investigation ("TBI"), testified that he found the victim's blood on several samples sent to him by the officers in this case. He also found a mixture of blood on the Defendant's right boot, and he could not exclude the victim as the source of this blood.

Linda Wilson, with the identification section of the Metro Nashville Police Department, testified that she analyzed the fingerprints in this case. She said that, after comparing the prints, she found the Defendant's fingerprints on the main bathroom door and on the telephone handset in the den. She found Lopez's prints on the top of the chicken and dumplings can found at the crime scene. She compared the other fingerprints with other suspects, including Veach, and she was unable to match any other suspects' prints to the prints found at the scene or on the victim's car.

Jim Fuqua, a lead investigator with the Metro Nashville Police Department, testified that he assisted with the investigation of this homicide, and he interviewed Todd Irvine who he described as "distraught, very upset, nervous, shaking, [and] . . . obviously upset." He said that, during his search of the residence, he found letters written from Veach to the victim. The officer did not seize the letters, but Veach was the police's initial suspect. Investigator Fuqua spoke with Beech, and she told him that she had been with Veach in another county at the time of the homicide. She then told him that she had picked up a man a week prior and brought him to the victim's house.

Investigator Fuqua testified that, as part of this investigation, he also subpoenaed the telephone records of the victim and of Todd Irvine in an attempt to confirm Irvine's statements about the night of this killing. From those records, the investigator determined that Irvine had, in fact, made several calls to the victim that evening. The telephone records from the victim's home showed that, the night of November 22 and morning of November 23, there were several calls made after midnight from the victim's home to Floyd's house. The police spoke with Floyd, which is how co-defendant Lopez became a suspect. The phone records also indicated that there were multiple calls between Flatt and the victim's house during the day and evening of the murder.

On cross-examination, Investigator Fuqua testified that they were never able to locate the TV and VCR that were taken from the victim's home. The investigator agreed that neither Veach nor Beech ever mentioned the Defendant as a suspect. Further, there were no phone records linking the Defendant to the victim's house. Finally, he agreed that the DNA found on the Defendant's pants was the Defendant's own DNA.

Dr. Feng Li, the assistant medical examiner for Davidson County, testified that he performed the autopsy of the victim's body. The doctor determined that the cause of death was blunt force injuries to the victim's head and neck, and he described all of the victim's injuries in detail. The victim had a blood alcohol level of .176, and his urine test came back negative for the presence of drugs.

This concluded the State's proof, and the Defendant filed a motion for judgment of acquittal, which the trial court denied. Thereafter, the following evidence was presented by the Defendant.

Clayton "Rabbit" Veach testified that he was currently in the custody of the Department of Corrections for being a habitual criminal for committing grand larceny, auto burglary, and

concealing stolen property, among other charges. Veach testified that Beech was his ex-wife and that they reconciled on and off while he was in and out of prison. He said that he had known the victim since Veach was fifteen years old and that they were good friends. The night before he learned of the victim's murder, he was at a motel with Beech and then the two went to a trailer together. Veach said that he told Beech that he had a television at his friend's house near the victim's home. He told her that he did not want to drive there because he was wanted by police. Beech left his trailer and did not return for three or four hours, at around 1:00 a.m. When Beech returned, she had a television set with her and a roll of \$100 dollar bills. Veach testified that, previously, Beech had asked him to rob the victim, and Veach said he would not. Beech then indicated she had found someone else to help her.

On cross-examination, Veach said that he had written the victim letters and that they were never threatening in nature. He denied having anything to do with the victim's murder. Veach also agreed he may have told police previously that he had been with Beech the whole evening that the murder occurred.

Stella Mae Mitchell testified that she worked at the Four Aces, and she knew Sharon Vickers and the Defendant. Mitchell said that she was not fired for a drug problem, and she had never seen the Defendant in a white vehicle. The Defendant had a maroon car. Mitchell testified that she did not recall an incident where she did not show up for work and Vickers had to work for her. Further, Mitchell said that she had never seen the Defendant trying to sell a television or a VCR. On cross-examination, Mitchell testified that she considered the Defendant her friend. Mitchell said that she would be surprised if the Defendant had said that he did not own a car at all because she had seen him in the maroon car.

Donald Mathis testified that he had previously been convicted twice of felony theft and once of evading arrest. Originally, Mathis was going to testify for the State in this case, and he had spoken with detectives when his evading arrest conviction was pending. He said that the statement that he gave to detectives was untrue and that he had no direct knowledge of the victim's murder. He said that he had only been to the victim's house once, with Lopez, and that was to sell some merchandise. Mathis did not recall the date that they went into the house, but he remembered that Lopez went inside, and Mathis had never been in the victim's home. After Mathis spoke with detectives, he went back to the cell that he shared with Lopez. Lopez told him that he needed to tell the truth because Lopez was facing 51 years in prison. Mathis said that he also knew the Defendant from jail. On cross-examination, Mathis said that Lopez was in the victim's home for approximately ten minutes, and he received approximately \$40 or \$45 in cash for the items that they sold to the victim, which they split between the two of them. Mathis agreed that he had previously told a different story to detectives but said that he was lying before.

Fred Hunter testified that he was in the custody of the Department of Correction serving a sentence for manslaughter and conspiracy to sell over 300 grams of cocaine. While incarcerated, Hunter went to an AA meeting, and he sat next to the Defendant. After the meeting, Lopez approached Hunter and asked Hunter if he knew "dude," referring to the Defendant. Hunter said he did not know the Defendant, and Lopez said that the Defendant was

going to kill him because he got the Defendant messed up in a murder charge. Lopez said that the murder weapon was a can of pork and beans and that his fingerprints were on the can. Hunter asked Lopez if the Defendant had killed the person, and Lopez responded "no not really." Hunter said that he told police about this conversation. On cross-examination, Hunter said that Lopez indicated that he was scared of the Defendant.

The Defendant testified that he spoke with Detectives about this case, and the detectives told him that the victim had died. He told detectives that he had never been to the victim's home and said he did not know the victim. The Defendant said that, at that point, he did not know who "William Craig" was, and his answer was truthful. The Defendant said that he was also truthful when he said that he did not know Lopez because he did not know Lopez by that name. Further, he was truthful about how he received the cut on his hand. The Defendant testified that he was only untruthful about the fact that he had never been to the victim's home and that was because he was scared. He agreed that he had also denied that his nickname was Fredro but explained that he did not think that Lopez knew him by that name.

The Defendant testified that he worked as a welder prior to these events and, on November 9, 2000, he went to see his parole officer. He was on parole for two counts of felony theft and for escape. The Defendant said that he was on work release as part of his parole. His friend, Betty Durham, picked him up from jail to take him to work, and, at some point, they stopped at a Wendy's where the Defendant saw his daughter. His conversation with his daughter upset him, and he later had Durham meet him at Donelson Pub. The Defendant explained that drinking had been a problem for him his whole life, and it had led to "esophageal varices," a condition that caused him to be hospitalized four times during the month of November of 2000 for vomiting blood. He said that this explained why his own blood was found on his pants recovered by police.

The Defendant described the events that occurred on November 29, 2000, stating that he had gone to the East Side Bar and drank there for several hours. Around 5:00 p.m., he walked to Mac's Market and ran into an acquaintance, whose name he did not know and who was driving a maroon four-door Lincoln Continental. The man gave him a ride, and instead of going to Mac's Market they went to a Mapco market down the street. There, he saw a man named "Jeff" on the telephone, and Jeff came over to them and got into the car to ride around with them. At that point, Lopez also got into the car with Jeff. The Defendant testified that he had never seen Lopez before this, but Jeff said that Lopez was "cool." Jeff told the Defendant that Lopez had some shirts to sell, and the Defendant turned around and saw that Lopez was holding shirts that still had the tags attached.

According to the Defendant, Lopez asked the driver of the maroon car to take him to sell the shirts, and the driver took him to a store where he sold the shirts for cash. While riding around, the subject of marijuana was raised, and Lopez said that he knew where they could get some. Lopez directed them to the victim's house. Lopez got out of the car and went to the door of the house. When he returned, he said that the victim was on the phone with his lawyer, and they needed to come back later. Around 8:00 p.m. they returned to the victim's house, and Lopez again got out of the car and was inside the house for around thirty minutes. The

Defendant consumed six beers while Lopez was in the house and was about to leave when Lopez came to the front door. The Defendant yelled that he had to use the bathroom, and Lopez waived for him and directed him to the bathroom. While he was in the house he heard arguing, and when he left the bathroom he saw the victim and Lopez fighting.

The Defendant testified that he saw Lopez and the victim fighting in the kitchen, and he saw Lopez hitting the victim in the head with a can, saying that the victim “owed [him].” The Defendant attempted to leave the house, and when he looked out the door the two other people in the car were gone. He said that he was startled and kept hearing a “bunch of racket” in the kitchen. He turned when the noise stopped, and he saw Lopez exiting the rear of the house. The Defendant picked up the phone, but then Lopez showed him some keys and offered to give him a ride if he helped load a television, VCR, and box into the car. The Defendant said that he did not help Lopez carry anything to the car but that he did get into the passenger’s seat of the car. Lopez asked him to open the gate, which the Defendant did. As they were driving away, the Defendant noticed a television cord hanging out of the door, and he told Lopez to put the cord inside the car. The Defendant said that he saw Lopez pull out a wallet with money in it, and he told Lopez to take him to the Four Aces Bar.

The Defendant said that, when they got to the bar, he told Lopez to get away from him, and Lopez called a black man who came and picked him up from the bar. He said that he never saw Lopez again. Later, when he was incarcerated, he learned that the victim had been killed. The Defendant said that he did not call the police because he was on parole, and he did not think that the victim had been killed. The Defendant said that he did not knowingly or willingly go into the victim’s house to take anything from him or to harm him.

On cross-examination, the Defendant admitted that he was at the victim’s home on November 29, 2000, and that he was there with Lopez. He agreed that he lied to the detective when he said that he was not at the victim’s home on the night that he was murdered. He agreed that he left the work release program while he was at the correctional facility and again attributed it to his conversation with his daughter. The Defendant said that he later learned that the driver of the maroon car was named Diante but agreed that he never provided police with this name. He also agreed that he never told the authorities about the man named Jeff or provided Jeff’s last name. The Defendant also admitted that he never called 911 while Lopez was beating the victim, and he never tried to get out of the car while Lopez was driving him to the Four Aces Bar.

Debra Stone testified that she is employed at the VA medical center in Murfreesboro, Tennessee, and she maintains the records including the Defendant’s records. She testified that the Defendant suffers from a history of esophageal varices. He was admitted on November 12, 2000, through November 15, 2000, with the principal diagnosis being “upper gastrointestinal bleed.” He was again admitted on November 16, 2000, and discharged on November 17, 2000. Further, he was admitted on November 22, 2000, and discharged the 24th of November.

Based upon this evidence, the jury convicted the Defendant of first degree felony murder and theft of property valued over \$1,000.

II. Analysis

On appeal, the Defendant alleges that: (1) the trial court erred when it denied his motion for a judgment of acquittal at the close of the State's proof; (2) the evidence is insufficient to sustain his convictions; and (3) the trial court failed to perform its role as a thirteenth juror.

A. Judgment of Acquittal and Sufficiency of the Evidence

The Defendant first contends that the trial court erred when it denied his motion for judgment of acquittal. The Defendant asserts that the trial court never ruled on the Defendant's motion for judgment of acquittal, and it did not reserve the motion for later ruling. Further, the Defendant asserts that there was insufficient proof at the close of the State's case to connect him to the crime scene.

Tennessee Rule of Criminal Procedure 29(a) provides:

Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the State is not granted, the defendant may offer evidence without having reserved the right.

Upon a thorough review of the record, it appears that the trial court did, in fact, implicitly rule on the Defendant's motion for judgment of acquittal. The trial court listened to arguments of all the attorneys involved. At one point, the Defendant's counsel stated, "Granted, our motion may be premature at this time and we may renew it at the end of the defense proof . . . and we would have another theory. We can't deny the physical and scientific evidence that links my client to the residence." The trial court expressed concern that "not a single witness . . . places [the Defendant] and Mr. Lopez even being acquainted" and heard more arguments from counsel. Following additional arguments from defense counsel, the trial court stated:

I think there are two issues included in both these motions for judgment of acquittal that are matters of substance. I say matters of substance because oftentimes these motions for judgment of acquittal in [a] criminal . . . case . . . are pretty pro forma, they're pretty easy for the judge to resolve and the case goes ahead and the lawyers make them more out of habit than out of any real substance.

There are two issues of substance here. Is there sufficient proof of premeditation and in Mr. Lopez's case is there sufficient proof to connect him with this crime. I think . . . it's a close call on . . . both issues but I think there is

sufficient proof.

We conclude that the trial court adequately articulated its denial of the Defendant's motion for judgment of acquittal.

Further, in *Mathis v. State*, 590 S.W.2d 449 (Tenn. 1979), the Tennessee Supreme Court held that when a trial court:

[O]verrules, or does not act, upon a motion for an acquittal made at the conclusion of the State's proof, if counsel is convinced as to the validity of the motion, he or she must then and there take affirmative action to confine the controversy to the proof already presented. He or she should announce that the defendant stands on his motion, will present no proof, disclaims any benefit of any evidence introduced by his defendant, disavows any detriment, and should state that the evidence presented by the co-defendant will not be binding upon him, and he should participate no further in the trial until after the conclusion of all the proof.

Id. at 453. The Court went on to state that by failing to close his case and by participating in the trial, the defendant in that case had waived the error in the action of the court on his motion for an acquittal. *Id.*

Recently, the Tennessee Supreme Court discussed its previous holding in *Mathis* and recognized the "difficult choice" facing a defendant if the defendant moves for a judgment of acquittal at the close of the State's proof and the trial court does not grant that motion. *Ronnie Finch v. State*, -- S.W.3d --, No. M2004-02887-SC-R11-PC, 2007 WL 1585158, at *7 (Tenn. June 4, 2007). The Court, however, noted that *Mathis* has, to date, "not been limited or overruled." *Id.* at *8. In *Finch*, the issue before the Court was whether the defendant's counsel was ineffective for not standing on his judgment of acquittal motion. *Id.* The Court stated, "While we are sensitive to the conundrum facing defense lawyers under its holding, we need not revisit our decision in *Mathis* in this case unless we determine that the proof was insufficient to support the Petitioner's convictions as of the close of the State's case-in-chief." *Id.* The Court went on to conclude that the evidence presented in the State's case-in-chief was sufficient to support a denial of the petitioner's motion for judgment of acquittal at the close of the State's proof, and he was, therefore, not prejudiced so as to be entitled to post-conviction relief. *Id.* at 11.

In the case under submission, the Defendant did not stand on his motion for judgment of acquittal but rather continued participating in the trial. He, in fact, testified on his own behalf. As noted by the Tennessee Supreme Court, *Mathis* has not been overruled, and it is binding precedent on this Court. Therefore, the Defendant has waived his right to appeal from the trial court's refusal to grant his motion for judgment of acquittal. *Mathis*, 590 S.W.2d at 453. Further, because the Defendant elected to introduce evidence, "the appellate review encompasses the evidence in toto." *Finch*, 2007 WL 1585158, at *7 (quoting *State v. Rutan*, 194 Conn. 438, 479 A.2d 1209, 1211 (Conn. 1984)).

We now turn to decide whether the evidence in toto was sufficient to sustain the Defendant's convictions for felony murder and for theft of property valued over \$1000. When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); see Tenn. R. App. P. 13(e); *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). A conviction may be based entirely on circumstantial evidence where the facts are "so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone." *State v. Smith*, 868 S.W.2d 561, 569 (Tenn. 1993). The jury decides the weight to be given to circumstantial evidence, and "[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury." *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (citations omitted).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). "Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *State v. Grace*, 493 S.W.2d 474, 479 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1996) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

Pursuant to Tennessee Code Annotated section 39-14-103 (1997), “A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner’s effective consent.” Theft of property is a Class D felony if the value of the property obtained is between \$1000 and \$10,000. T.C.A. § 39-14-105(3) (1997). The evidence, viewed in the light most favorable to the State, proved that the Defendant and Lopez went to the victim’s house to purchase marijuana. There, they took a television and VCR, and they left the victim’s home in the victim’s car. The Defendant was seen driving this car and attempting to sell the television and VCR at the Four Aces Bar. The value of the car was established at over \$1000. This evidence is sufficient to sustain the Defendant’s conviction for theft.

The Defendant was also convicted of the first degree felony murder of the victim. First degree felony murder is “[a] killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, act of terrorism, arson, rape, robbery, burglary, theft, kidnaping, aggravated child abuse, aggravated child neglect or aircraft piracy” T.C.A. § 39-13-202(a)(2) (1997). “No culpable mental state is required for conviction under subdivision (a)(2) . . . except the intent to commit the enumerated offenses or acts in such subdivisions.” Tenn. Code Ann. § 39-13-202(b).

The law does not require that the felony necessarily precede the murder in order to support a felony murder conviction. *Buggs*, 995 S.W. at 106. “The killing may precede, coincide with, or follow the felony and still be considered as occurring ‘in the perpetration’ of the felony offense, so long as there is a connection in time, place, and continuity of action.” *Id.* The Tennessee Supreme Court has stated:

To support a felony murder conviction, the intent to commit the underlying felony must exist prior to or concurrent with the commission of the act causing the death of the victim. [Buggs, 995 S.W.2d [at] 107 Although the intent to commit the underlying felony cannot be presumed from the act of committing the felony, a jury may reasonably infer from a defendant’s actions immediately after a killing that the defendant had the intent to commit the felony prior to or concurrent with the killing. Id. at 108.

State v. Leach, 148 S.W.3d 42, 54 (Tenn. 2004) (emphasis added). There is no felony murder where the felony occurs as an afterthought following the killing. *See Buggs*, 995 S.W.2d at 107.

Proof that the intent to commit the underlying felony existed before, or concurrent with, the act of killing is a question of fact to be decided by the jury. *Id.* A jury may reasonably infer from a defendant’s actions immediately after a killing that the defendant had the intent to commit the felony prior to, or concurrent with, the killing. *Id.* at 108 and n.3 (stating, “The principle in robbery-murder cases that the intent to rob may be inferred from a defendant’s actions immediately following a killing, is one that is generally accepted” and providing multiple citations).

We previously concluded that the evidence is sufficient to sustain the Defendant’s

conviction for theft. We additionally conclude that a jury could rationally infer that the victim's murder was committed in the perpetration of a theft. The Defendant went to the victim's home to purchase marijuana. The victim was, at the time talking on the phone with a friend, whom he told that some of Beech's "friends" had come to the house. The Defendant may or may not have waited while Lopez went inside the house to purchase the drugs. He was, according to witnesses, in the house while the murder was occurring. He went to the bathroom, touched the outside of the door, and handled the telephone in the room next to where the victim was murdered. The victim's car, television, and VCR were all taken from the home. The Defendant was seen that day driving the victim's car and attempting to sell a television and VCR. When questioned by police, the Defendant denied ever being at the victim's house. The victim could not be excluded as the contributor of the blood found on the Defendant's boots. The Defendant testified at trial that he was, in fact, at the house when the murder occurred but that he did not participate in the murder or the theft. The jury discredited the Defendant's testimony, and it could have inferred that the intent to commit the theft occurred before, or concurrent with, the beating death of the victim. As such, the evidence is sufficient to sustain the Defendant's felony murder conviction, and he is not entitled to relief on this issue.

B. Thirteenth Juror

The Defendant next asserts that the trial court did not properly perform its role as the thirteenth juror. He asserts that the trial judge was asked in his "REPORT OF TRIAL JUDGE IN FIRST DEGREE MURDER CASE" whether the judge, acting as the thirteenth juror, found the Defendant guilty beyond a reasonable doubt. The trial judge marked "No," and the Defendant asserts that the trial judge, therefore, clearly should have granted his motion for a new trial.

Tennessee Rule of Criminal Procedure 33(f) imposes a mandatory duty on the trial judge to serve as the thirteenth juror in every criminal case. *State v. Carter*, 896 S.W.2d 119, 122 (Tenn. 1995). Rule 33(f) does not require the trial judge to make an explicit statement on the record. Instead, when the trial judge simply overrules a motion for new trial, an appellate court may presume that the trial judge has served as the thirteenth juror and approved the jury's verdict. *Id.* Only if the record contains statements by the trial judge indicating disagreement with the jury's verdict or evidencing the trial judge's refusal to act as the thirteenth juror, may an appellate court reverse the trial court's judgment. *Id.* Otherwise, appellate review is limited to sufficiency of the evidence pursuant to Rule 13(e) of the Rules of Appellate Procedure. *State v. Burlison*, 868 S.W.2d 713, 718-19 (Tenn. Crim. App. 1993). If the reviewing court finds that the trial judge has failed to fulfill his or her role as thirteenth juror, the reviewing court must grant a new trial. *State v. Moats*, 906 S.W.2d 431, 435 (Tenn. 1995).

At the conclusion of the hearing on the motion for a new trial, the trial judge stated his findings on this issue as follows: "I'm also of the opinion that the proof in this case, both direct and circumstantial, is sufficient to support the verdict. I approve the verdict and other contentions in both the motions for a new trial So these motions . . . for a new trial are respectfully overruled." Thus, the judge indicated his approval of the verdict and his willingness to fulfill his role as thirteenth juror.

The Defendant correctly notes that the trial judge then marked “No” to the question “Did you as ‘thirteenth juror’ find the defendant was guilty beyond a reasonable doubt?” when completing his report generated pursuant to Tennessee Supreme Court Rule 12.1. It is apparent from the entire record that this was simply a clerical error, and it does not entitle the Defendant to appellate relief.

III. Conclusion

Based on the foregoing reasoning and authority, we affirm the judgments of the trial court.

ROBERT W. WEDEMEYER, JUDGE